Mohanna a/l Rengasamy (sued as a partner of The Law Office of Mohanna & Co) & Anor v Krishna Kumar a/l Kalianan

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12B-50–05 OF 2024
JAMHIRAH ALI J
11 AUGUST 2025

Tort — Negligence — Professional negligence — Respondent sued his solicitors for professional negligence — Solicitors submitted no case to answer — Sessions court found respondent's solicitors negligent in preparing conveyancing documentations in relation to sale and purchase transaction — Effect of solicitors' election to submit no case to answer — Whether sessions court judge erred in concluding that expert evidence was not necessary to establish standard of care in the present professional negligence claim — Whether respondent discharged burden of proving that solicitors breached their duty of care and caused loss — Whether sessions court judge's decision ignored doctrine of stare decisis

The present appeal was in relation to the allegations of negligence and breach of duty by solicitors (the appellants) involved in a sale and purchase transaction. In this regard, the respondent had already paid the deposit amounting to RM38,000 ('the deposit') but due to the alleged negligence by the appellants, the sale and purchase transaction was not completed and ultimately failed. To make matters worse, the respondent's claim against the vendor ('the Shah Alam case') was disallowed at the appeal stage before the Court of Appeal which in effect caused the respondent to suffer financial loss, including the forfeiture of the deposit and additional costs incurred. The respondent then filed an action against the appellants in the sessions court for professional negligence. The gist of the dispute between the parties was the appropriateness of the documentation prepared by the appellants and whether the respondent had sufficiently proven the required standard of care and causation of loss. The sessions court held that the appellants failed in their duties as conveyancing solicitors, resulting in the respondent suffering losses in a property transaction. Dissatisfied with the decision, the appellants filed the present appeal. The issues to be determined by the court were: (a) whether the learned sessions court judge ('the SCJ') erred in concluding that expert evidence was not necessary to establish the standard of care in the present professional negligence claim; (b) whether the respondent discharged the burden of proving that the appellants breached their duty of care and caused the loss claimed; (c) whether the SCJ's decision ignored the doctrine of stare decisis by not following the ratios in *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207 ('Tetuan Theselim') and *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 ('Shearn

Delamore & Co v Sadacharamani'); and (d) the effect of the appellants' election to submit no case to answer.

Held, dismissing the appeal with costs of RM15,000 and upholding the decision of the sessions court:

(1) The court found that the nature of the alleged negligence in the present case — such as preparing documents with incorrect addresses, inconsistent dates, and contradictions between statutory declarations, caveat forms, and the sale and purchase agreement ('the SPA') — was not of such complexity that expert assistance was necessary. These were basic errors apparent on the face of the documents and did not involve nuanced questions of conveyancing practice where professional opinion would be needed. Therefore, the court agreed that the learned SCJ was entitled to determine the standard of care based on the documents and evidence presented. The decision was in line with judicial precedent, and there was no misapplication of the doctrine of stare decisis (see paras 33 & 35).

(2) With respect to negligence, it was trite law that the plaintiff must prove: (a) a duty owed; (b) a breach of that duty, and (c) damage resulting from the breach. The duty of care owed by a solicitor, especially in conveyancing, was well recognised. A solicitor must exercise the skill, care, and diligence expected of a reasonably competent practitioner to ensure that documents were accurate, complete, and consistent, and that the client's interests were protected (see paras 36–37).

(3) In the present case, the respondent pleaded and proved that the appellants prepared documentation that was riddled with inconsistencies. The errors were detailed in evidence and highlighted by the sessions court, which the appellants did not rebut: (a) the caveat form (Form 19B) was dated 14 June 2015, prior to the SPA, which was dated 3 July 2015; (b) the statutory declaration for the caveat application was dated 14 July 2015, which created contradictions regarding the sequence of events; (c) the address of the property was incorrectly stated in multiple documents, with some references to a completely different location; and (d) the SPA itself contained inaccurate descriptions of the property ('the said irregularities/discrepancies'). The respondent's former solicitor, SP3, testified that the Court of Appeal in the Shah Alam case attached considerable importance to the said irregularities and the appellants in the present case did not challenge such evidence from SP3 (see paras 38–39).

(4) In the present case, the evidence presented was sufficient to establish the respondent's claim, thereby shifting the evidential burden onto the appellants. The appellants, however, elected to submit no case to answer and consequently called no witnesses nor produced any evidence to

explain the discrepancies or rebut the respondent's case. Although the legal burden of proof remained with the respondent, once the evidential burden had shifted, the lack of defence evidence left the trial judge with only the respondent's version to consider. Under these circumstances, the sessions court was justified in drawing adverse inferences against the appellants and in accepting the respondent's case in its entirety (see paras 40 & 49).

(5) On the question of causation, the respondent proved that the negligent preparation of documents directly caused the failure of the transaction and the loss of his RM38,000 deposit. The appellants attempted to argue that the loss was caused by factors outside their control, but having chosen not to give evidence, they had no factual basis for this argument. The court found that the SCJ had correctly held that the breach of duty by the appellants was causally linked to the loss suffered (see para 41).

(6) The court disagreed with the appellants' argument that the SCJ's decision ignored the doctrine of stare decisis by not following the ratio in *Tetuan Theselim* and *Shearn Delamore & Co v Sadacharamani*. The doctrine of stare decisis required lower courts to follow binding precedent. However, it also allowed a court to distinguish cases where the factual circumstances were notably different. In the present case, the learned SCJ examined the authorities cited, explained why they did not apply strictly, and instead relied on other binding decisions such as *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380 and *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* [2020] 5 MLJ 549, which permitted the court to proceed without expert evidence when negligence was obvious. Accordingly, the learned SCJ did not disregard precedent; she applied the correct legal principles to the facts before her (see paras 43–46).

(7) Considering the totality of the evidence, the court agreed that the sessions court was correct to conclude that the appellants, as the respondent's conveyancing solicitors, owed him a duty of care which they breached by making serious and fundamental errors in preparing key documents. These breaches were so obvious that no expert evidence was needed to prove them, and they directly caused the losses the respondent suffered. The findings were well supported by evidence and consistent with the applicable law. There was no error warranting appellate intervention (see paras 50–51).

[Bahasa Malaysia summary

Rayuan semasa adalah berkaitan dengan dakwaan kecuaian dan pelanggaran kewajipan oleh peguamcara (perayu-perayu) yang terlibat dalam suatu transaksi jual beli. Dalam hal ini, responden telah membayar deposit berjumlah RM38,000 ('deposit') tetapi disebabkan oleh kecuaian oleh

perayu-perayu sepeti yang didakwa, transaksi jual beli tersebut tidak diselesaikan dan akhirnya gagal. Lebih buruk lagi, tuntutan responden terhadap penjual ('kes Shah Alam') telah ditolak pada peringkat rayuan di Mahkamah Rayuan yang menyebabkan responden mengalami kerugian kewangan, termasuk kehilangan deposit dan kos tambahan yang ditanggung. Responden kemudiannya memfailkan tindakan terhadap perayu di mahkamah sesyen atas kecuaian profesional. Inti pati pertikaian antara pihak-pihak adalah kewajaran dokumentasi yang disediakan oleh perayu-perayu dan sama ada responden telah membuktikan dengan secukupnya standard berjaga-jaga yang diperlukan dan sebab-akibat kerugian. Mahkamah sesyen memutuskan bahawa perayu gagal dalam kewajipan mereka sebagai peguamcara pemindah milik, mengakibatkan responden mengalami kerugian dalam transaksi hartanah. Tidak berpuas hati dengan keputusan tersebut, perayu-perayu memfailkan rayuan semasa. Isu-isu yang perlu ditentukan oleh mahkamah adalah: (a) sama ada hakim mahkamah sesyen yang bijaksana ('HMS') terkhilaf dalam membuat kesimpulan bahawa keterangan pakar tidak diperlukan untuk menetapkan standard berjaga-jaga dalam tuntutan kecuaian profesional semasa; (b) sama ada responden telah melepaskan beban membuktikan bahawa perayu-perayu melanggar kewajipan berjaga-jaga mereka dan menyebabkan kerugian yang dituntut; (c) sama ada keputusan HMS mengabaikan doktrin stare decisis dengan tidak mematuhi ratio dalam *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207 ('Tetuan Theselim') dan *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 ('Shearn Delamore & Co v Sadacharamani'); dan (d) kesan pilihan perayu-perayu untuk tidak mengemukakan apa-apa kes untuk dijawab.

Diputuskan, menolak rayuan dengan kos sebanyak RM15,000 dan mengekalkan keputusan mahkamah sesyen:

(1) Mahkamah mendapati bahawa sifat kecuaian yang didakwa dalam kes semasa — seperti menyediakan dokumen dengan alamat yang salah, tarikh yang tidak konsisten, dan percanggahan antara pengisytiharan berkanun, borang kaveat, dan perjanjian jual beli ('PJB') — tidaklah begitu rumit sehingga memerlukan bantuan pakar. Ini adalah kesilapan asas yang jelas pada zahir dokumen tersebut dan tidak melibatkan persoalan bernuansa amalan pemindahhakan di mana pendapat profesional diperlukan. Oleh itu, mahkamah bersetuju bahawa HMS yang bijaksana berhak menentukan standard berjaga-jaga berdasarkan dokumen dan keterangan yang dikemukakan. Keputusan tersebut selaras dengan duluan kehakiman, dan tidak terdapat salah guna doktrin stare decisis (lihat perenggan 33 & 35).

(2) Berkenaan dengan kecuaian, adalah menjadi undang-undang yang mantap bahawa plaintif harus membuktikan: (a) kewajipan yang ada; (b) pelanggaran kewajipan tersebut, dan (c) kerugian yang terhasil

daripada pelanggaran tersebut. Kewajipan berjaga-jaga yang dipunyai oleh seorang peguam cara, terutamanya dalam pemindahhakan harta, telah diiktiraf secara meluas. Seorang peguam cara harus menggunakan kemahiran, ketelitian dan ketekunan yang diharapkan daripada seorang pengamal yang agak cekap untuk memastikan bahawa dokumen adalah tepat, lengkap dan konsisten, dan kepentingan klien dilindungi (lihat perenggan 36–37).

(3) Dalam kes semasa, responden telah memplid dan membuktikan bahawa perayu-perayu telah menyediakan dokumentasi yang penuh dengan ketidakkonsistenan. Kesilapan-kesilapan tersebut telah diperincikan dalam keterangan dan diserlahkan oleh mahkamah sesyen, yang mana perayu-perayu tidak menyangkalnya: (a) borang kaveat (Borang 19B) bertarikh 14 Jun 2015, sebelum PJB, yang bertarikh 3 Julai 2015; (b) akuan berkanun untuk permohonan kaveat bertarikh 14 Julai 2015, yang mewujudkan percanggahan mengenai urutan peristiwa; (c) alamat harta tersebut telah dinyatakan secara salah dalam pelbagai dokumen, dengan beberapa rujukan kepada lokasi yang sama sekali berbeza; dan (d) PJB itu sendiri mengandungi penerangan yang tidak tepat tentang harta tersebut ('ketidakselarasan/percanggahan tersebut'). Bekas peguamcara responden, SP3, memberi keterangan bahawa Mahkamah Rayuan dalam kes Shah Alam meletakkan kepentingan yang agak tinggi terhadap ketidakselarasan tersebut dan perayu-perayu dalam kes semasa tidak mencabar keterangan SP3 tersebut (lihat perenggan 38–39).

(4) Dalam kes semasa, keterangan yang dikemukakan adalah mencukupi untuk membuktikan tuntutan responden, justeru mengalihkan beban keterangan kepada perayu-perayu. Walau bagaimanapun, perayu-perayu memilih untuk tidak mengemukakan apa-apa kes untuk dijawab dan akibatnya tidak memanggil saksi mahupun mengemukakan apa-apa keterangan untuk menjelaskan percanggahan tersebut atau menyangkal kes responden. Walaupun beban pembuktian undang-undang kekal pada responden, sebaik sahaja beban keterangan telah beralih, kekurangan keterangan pembelaan meninggalkan hakim bicara hanya dengan versi responden untuk dipertimbangkan. Dalam keadaan ini, mahkamah sesyen adalah wajar untuk membuat inferens bertentangan terhadap perayu dan menerima kes responden secara keseluruhannya (lihat perenggan 40 & 49).

(5) Mengenai persoalan sebab-akibat, responden membuktikan bahawa penyediaan dokumen dengan cuai tersebut secara langsung menyebabkan kegagalan transaksi jual beli tersebut dan kehilangan deposit RM38,000 miliknya. Perayu-perayu cuba berhujah bahawa kerugian tersebut disebabkan oleh faktor-faktor di luar kawalan mereka, tetapi setelah memilih untuk tidak memberikan keterangan, mereka tidak mempunyai asas fakta untuk hujah ini. Mahkamah mendapati

bahawa HMS telah memutuskan dengan betul bahawa pelanggaran kewajipan oleh perayu secara kausalnya dikaitkan dengan kerugian yang dialami (lihat perenggan 41).

(6) Mahkamah tidak bersetuju dengan hujah perayu-perayu bahawa keputusan HMS mengabaikan doktrin stare decisis dengan tidak mengikuti ratio dalam kes *Tetuan Theselim* dan *Shearn Delamore & Co v Sadacharamani*. Doktrin stare decisis menghendaki mahkamah rendah mengikuti duluan yang mengikat. Walau bagaimanapun, ia juga membenarkan mahkamah membezakan kes-kes di mana keadaan faktanya berbeza dengan ketara. Dalam kes semasa, HMS yang bijaksana telah meneliti autoriti yang dikemukakan, menjelaskan mengapa ia tidak terpakai secara ketat, dan sebaliknya bergantung pada keputusan mengikat lain seperti *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380 dan *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* [2020] 5 MLJ 549, yang membenarkan mahkamah meneruskan kes tanpa keterangan pakar apabila kecuaian jelas berlaku. Sehubungan itu, HMS yang bijaksana tidak mengabaikan duluan; beliau menggunakan prinsip perundangan yang betul terhadap fakta-fakta yang ada dihadapannya (lihat perenggan 43–46).

(7) Mengambil kira keseluruhan keterangan, mahkamah bersetuju bahawa mahkamah sesyen adalah betul untuk membuat kesimpulan bahawa perayu-perayu, sebagai peguam cara pemindahhakan responden, berhutang kepadanya kewajipan berjaga-jaga yang mereka langgar dengan membuat kesilapan serius dan asas dalam menyediakan dokumen-dokumen penting. Pelanggaran ini begitu jelas sehingga tiada keterangan pakar diperlukan untuk membuktikannya, dan ia secara langsung menyebabkan kerugian yang dialami oleh responden. Dapatan ini disokong dengan baik oleh keterangan dan selaras dengan undang-undang yang terpakai. Tiada kekhilafan yang mewajarkan campur tangan rayuan (lihat perenggan 50–51).]

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)

Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors [2020] 5 MLJ 549, CA (folld)

Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors [2016] 10 MLJ 517, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380, CA (folld)

Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Sornaratnam & Anor v Ramalingam [1981] 1 MLJ 24, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Tan Chow Soo v Ratna Ammal [1969] 2 MLJ 49, PC (refd)
Tech Food Ingredients Sdn Bhd & Anor v Blue Seal (M) Sdn Bhd & Ors and another suit [2024] MLJU 3987; [2024] CLJU 224, HC (refd)
Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, HC (refd)
Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207, CA (refd)

Legislation referred to

National Land Code Form 19B

Appeal from: Suit No BD-B53KP-2–07 of 2021 (Sessions Court, Selayang)

Taneswaran a/l Palaraman (with S Surianath (Pupil in Chambers)) (Tanes, Khoo & Paulraj) for the appellants.
V Muniandy (with Fiona Aurelia Culas) (Andy & Co) for the respondent.

Jamhirah Ali J:

INTRODUCTION

[1] This is the appellants/defendants' appeal against the decision of the learned sessions court judge ('SCJ') dated 16 May 2024, in which the respondent/plaintiff's claim for professional negligence and breach of contract was allowed. The sessions court awarded judgment in favour of the respondent as set out in paras 44(b) to (h) of the statement of claim, with interest at 5%pa from the date of judgment until full settlement, and costs of RM10,000.

[2] The appeal raises concerns about allegations of negligence and breach of duty by solicitors involved in a sale and purchase transaction. At the core of this dispute is the appropriateness of the documentation prepared by the appellants and whether the respondent has sufficiently proven the required standard of care and causation of loss.

[3] The sessions court held that the appellants failed in their duties as conveyancing solicitors, resulting in the respondent suffering losses in a property transaction.

[4] Having carefully reviewed the record of appeal, the submissions of both

parties, and the authorities cited, I find no merit in the appeal. For the reasons stated below, the appeal was dismissed, and the decision of the sessions court was upheld.

FACTS OF THE CASE

[5] The facts of this case originated from a conveyancing transaction that went wrong due to serious errors in preparing essential legal documents. The respondent, Krishna Kumar a/l Kalianan, was a layperson with no legal knowledge. He intended to purchase a property at No 34, Jalan Spektrum U16/9, Taman Bukit Subang, 40150 Shah Alam, Selangor Darul Ehsan, held under Geran No 75503, Lot 12258, Mukim Bukit Raja, Daerah Petaling, Selangor Darul Ehsan ('the said property') from the original vendors, Kalairani a/p Muthusamy and Sarimala Devi a/p Sekaran ('the vendors').

[6] The respondent had engaged and paid legal fees to the appellants, namely Mohanna a/l Rengasamy, a practicing solicitor, and his law firm The Law Office of Mohanna & Co, to handle all aspects of the transaction for the purchase of the said property, including the drafting and execution of the sale and purchase agreement ('SPA'), registration of a private caveat, and all related correspondence.

[7] The agreed purchase price of the said property was RM380,000, and the respondent paid a deposit of RM38,000 to the vendors. The appellants prepared the SPA and other relevant documentation. The respondent relied entirely on the appellants' legal expertise to ensure all documents were accurate and met conveyancing requirements.

[8] However, the transaction was not completed and ultimately failed. The respondent later discovered that several documents prepared by the appellants were inconsistent, inaccurate, and irregular. These included:

(a) a Form 19B private caveat dated 14 June 2015, which predates the SPA dated 3 July 2015;

(b) a statutory declaration supporting the caveat dated 14 July 2015, which contained inconsistencies regarding the timing of the transaction;

(c) discrepancies in the property description, where multiple documents prepared by the appellants contained incorrect addresses, including references to locations that were entirely different from the subject property; and

(d) other supporting letters prepared by the appellants that reiterate the incorrect property description.

[9] Initially, the respondent filed a suit against the vendors in the Shah Alam High Court under Suit No BA-22NCVC-190–03 of 2017. Although the High Court initially allowed the respondent's claim, the Court of Appeal reversed that decision.

[10] As a result, the respondent lost his claim against the vendors and suffered a financial loss, including the forfeiture of his RM38,000 deposit and additional costs incurred. Feeling aggrieved, he initiated the present action in the sessions court against the appellants, alleging professional negligence.

[11] The respondent argued that the appellants, as his solicitors, owed him a duty to exercise the care, skill, and diligence expected of reasonably competent conveyancing solicitors. He claimed that the appellants breached that duty by preparing defective documents, failing to detect and correct obvious errors, and not ensuring consistency in the transaction documentation. These failures, according to the respondent, directly caused his financial loss.

[12] At the sessions court trial, the respondent testified as SP1. He also called SP2, a valuer, and SP3, his former solicitor in the Shah Alam litigation. SP3's evidence was particularly significant, as he explained in detail how the Court of Appeal identified and relied on discrepancies in the documents to overturn the earlier High Court ruling. The evidence underscored that the appellants' preparation of documents was central to the failure of the respondent's earlier claim and the loss suffered.

[13] The appellants, in their defence, denied liability but elected to submit no case to answer at the close of the respondent's case. They did not adduce any evidence nor call witnesses to clarify or justify the discrepancies. Their legal argument was that, based on established case law, the respondent's claim must fail because he did not call an expert witness to demonstrate the standard of care in conveyancing practice.

[14] The sessions court rejected the appellants' arguments, noting that the errors were obvious and did not require expert evidence. The court held that the appellants had clearly breached their duty of care and that the respondent had established his case on a balance of probabilities.

[15] Dissatisfied with that decision, the appellants filed the present appeal, raising several grounds, including an alleged misapplication of the doctrine of stare decisis and the lack of expert testimony. It is within this factual backdrop that this court examined the appeal.

THE APPELLANTS' SUBMISSIONS

[16] The appellants' case was based on three primary arguments.

Expert evidence was required

[17] They argued that the sessions court erred by not requiring expert evidence to establish the applicable standard of care. They relied on the Court of Appeal's decisions in *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207 and *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486, which held that in cases involving professional negligence in specialised areas like conveyancing, the plaintiff must call expert testimony to prove the requisite standard of care. Without such evidence, the plaintiff's case should fail.

Breach of duty not proven

[18] The appellants argued that the respondent failed to prove a breach of duty or causation. They contended that mere errors in documents, without expert evidence proving the standard and demonstrating its breach, could not constitute negligence.

Departure from stare decisis

[19] The appellants contended that the sessions court had disregarded binding precedents and misapplied the law by ruling that expert evidence was unnecessary. They emphasised that the doctrine of stare decisis required the trial court to adhere to the principles established in *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* and *Shearn Delamore & Co v Sadacharamani a/l Govindasamy*.

[20] The appellants also emphasised that their decision to submit a 'no case to answer' at trial did not relieve the respondent of the burden of proof. They cited *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 to support this point.

THE RESPONDENT'S SUBMISSIONS

[21] The respondent opposed the appeal and defended the sessions court's findings, raising several key points.

Glaring errors required no expert

[22] The respondent argued that the errors in the documents prepared by the appellants were glaring and self-evident, making expert analysis unnecessary. The irregularities included inconsistent dates, conflicting property addresses, and discrepancies between the caveat form, SPA, and statutory declaration. These errors were directly linked to the loss suffered.

Negligence proven on a balance of probabilities

[23] The respondent further argued that the evidence, documentary exhibits, and testimony, especially from SP3 (his solicitor in the earlier Court of Appeal proceedings), clearly demonstrated that the appellants' omissions fell below the standard of care expected of conveyancing solicitors. The Court of Appeal's findings in the earlier case further confirmed the repercussions of these errors.

Expert evidence not always necessary

[24] The respondent cited *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380 and *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* [2020] 5 MLJ 549, which established that failing to call an expert is not necessarily fatal in every professional negligence case, especially where errors are obvious and can be evaluated by the court.

Effect of no case to answer

[25] The respondent argued that by electing to make a 'no case to answer' submission, the appellants risked adverse inferences being drawn against them. Citing *Tech Food Ingredients Sdn Bhd & Anor v Blue Seal (M) Sdn Bhd & Ors and another suit* [2024] MLJU 3987; [2024] CLJU 224 and *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, the respondent contended that the sessions court was justified in relying solely on the respondent's evidence.

THE LAW ON APPELLATE INTERVENTION

[26] I am reminded that an appellate court should be slow in interfering with a finding of fact by a trial court (see: *Sornaratnam & Anor v Ramalingam* [1981] 1 MLJ 24; *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; and *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211.

[27] The principles governing the appellate court's interference with the trial court's findings as enunciated in *Sivalingam a/l Periasamy v Periasamy & Anor*

[1995] 3 MLJ 395 are particularly useful here. The Court of Appeal held:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.
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> In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* (1942) 73 Lloyd LR 217:
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> The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. [Which, we hasten to add, is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. *If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view* — in these mundane happenings there is no more conclusive argument than *non est credendum quia* impossibile. *If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal*.
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> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (Emphasis added.)

[28] Furthermore, the Federal Court case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 had clearly demonstrated under what circumstances an appellate court ought to warrant an intervention:

> THE LAW IN APPELLATE INTERVENTION
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> [33] It was a *long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong* (the Supreme Court of United Kingdom in *McGraddie v McGraddie and another* [2013] 1 WLR 2477).
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> [34] The *'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records.* The *test was pioneered by the House of Lords in Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35*, when it adjudicated on the ability of an appellate court to reconsider the facts of a particular case, when there is alrea dy findings of fact by the lower court*. In this regard, Lord Shaw's judgment is pertinent when His Lordship said:

> *When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect*, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, *thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each J udge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case — in a position, not having those privileges, to come to clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment*.

[35] Lord Shaw's judgment was adopted by Viscount Sankey LC in *Powell v Streatham Manor Nursing Home* [1935] AC 243 when His Lordship made the following observation at p 250:

> *What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not hear the witnesses. It only reads the evidence and rehears the counsel*. Neither is it a reseeing Court ... On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses.

...

[37] In much later years, the House of Lords had the occasion to consider on the same issue in *Watt (or Thomas) v Thomas* [1947] AC 484, namely, when was it appropriate for an appellate court to set aside the judgment of the court on findings of fact at first instance, and it held that:

> *When a question of fact has been tried by a judge without a jury, and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witness, and should not disturb his judgment unless it is plainly unsound*.
>
> The appellate court is however free to reverse his conclusion if the grounds given

A by him therefore are unsatisfactory by reason of the material inconsistencies or inaccuracies or if it appears unmistakably from the evidence in reaching them, he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.

B ...

[60] The aforesaid cases illustrate the highly deferential attitude adopted by appellate courts in the United Kingdom towards reviewing findings of fact by the trial court. The test is not whether the higher court feels that it would have reached a different conclusion on the same facts as the trial court, but whether or not the C decision by the lower court on findings of fact was reasonable. In other words, if the trial judge's decision can be reasonably explained and justified, then appellate courts should refrain from intervention.

...

D [151] It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. *Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different* E *conclusion, this is not relevant when considering if a trial judge's findings of fact could be overturned. The task of the trial judge is hard enough, without having to deal with every single piece of evidence which may emerge in the course of the trial. If such a requirement was to be imposed on a trial judge then their task in hearing a case would be very tedious and the time taken to produce judgments would increase* ... (Emphasis added.)

F FINDINGS OF THE COURT

On the requirement of expert evidence

G **[29]** The primary and central issue raised by the appellants was whether the learned SCJ erred in concluding that expert evidence was not necessary to establish the standard of care in this professional negligence claim. The appellants relied on the Court of Appeal's decisions in *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* and *Shearn Delamore & Co* H *v Sadacharamani a/l Govindasamy*, which stated that when a plaintiff alleges professional negligence against solicitors in a specialised area such as conveyancing, the standard of care must typically be established through expert evidence. These authorities emphasise that the court cannot depend on the reasonable man's test, as in ordinary negligence cases, because the duty is I assessed against the competence of a reasonably skilled practitioner in that specialised field.

[30] The Court of Appeal in *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* stated as follows:

[28] In any event, there was merit in the argument that the defendants could not proceed with the loan documentation unless instructed by the plaintiffs' financiers even though the first defendant was in the bank's panel of solicitors. In this context, it is important to appreciate, and which the leaned judge overlooked, that in preparing the loan documents, the defendants will be acting for the bank and not the plaintiffs. As it turned out, the bank's instructions to the first defendant to prepare the loan documents came on 30 June 2006 after the expiry of the extended completion date of the SPA. For this reason as well, this ground could not form a basis for negligence against the defendants.

[29] The final finding which was also attacked was with regard to the failure by the defendants to advise the plaintiffs as to the progress of the transaction and also for unprofessional conduct. A glaring omission, which appeared to have been overlooked all round, was that no evidence was adduced to show the appropriate standard of care, competence and diligence which the defendants should be held up to in conveyancing practice. A solicitor, like all professionals, has a duty to exercise reasonable degree of care and skill expected of a competent and reasonably experienced solicitor. In exercising reasonable care and skill, one must act with integrity and diligence (see *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm)* [2010] 1 MLJ 284).

[30] Thus, whether the first defendant, and in particular the second defendant, who was the solicitor handling the transaction, were negligent may be determined by a consideration of the following questions:

(a) whether the standard of care practised by the second defendant was the same standard of reasonably competent solicitors in conveyancing practice; and

(b) whether the second defendant had acted with diligence in exercising the reasonable care and skill expected to assist the completion of the SPA.

[31] As alluded to earlier, it is unfortunate that no evidence was led as to the conveyancing practice in existence at the time. The learned judge appeared to rely on the evidence of the plaintiffs who were quite obviously not solicitors professing expertise in the field of conveyancing practice. The defendants, on the other hand, had the evidence of the third defendant who was a senior conveyancing practitioner. She testified that the procedure applied by the second defendant was in accordance with the accepted standards in conveyancing practice. Although she was an interested witness, her testimony was the best available evidence before the court. There was, at least, no material before the court to rule that the second defendant was guilty of unprofessional conduct. The finding of negligence in this context was therefore unfortunate.

[32] In this respect as well, we are compelled to note that there was no inquiry as to whether it was the first defendant's breach of duty which led to the losses sustained. The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In other words, was the defendant's act the effective cause of the harm suffered by the plaintiff? In this respect, the courts look to the test of causation known commonly as the 'but for' test (see *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328; *Chua Seng Sam Realty*

Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29; and *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449).

[31] However, this court noted that the principles from those cases are not strict rules applicable to every situation. The respondent highlighted *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* and *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors*, where the Court of Appeal decided that the absence of expert testimony is not necessarily fatal if the omissions or errors are blatant, obvious, and within the court's capacity to evaluate.

[32] The Court of Appeal in the case of *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* held that:

> [79] In this regard, we note that in *Shearn Delamore & Co v Sadacharamani Govindasamy* [2017] 1 MLJ 486; [2017] 2 CLJ 665; [2016] 6 AMR 797 (CA) the Court of Appeal had posited that a client who sues their former solicitors for professional negligence have the burden proving that the solicitor's conduct had fallen short of the standard of care of a reasonably competent solicitor and that this is to be done by calling an advocate and solicitor to satisfy the element of breach of the standard of care (see also *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449; [2014] 3 CLJ 984; [2014] 1 AMCR 829; [2014] AMEJ 0062 (CA)).
>
> [80] In *Shearn Delamore*'s case, the former client had contended that the solicitors were negligent in respect of legal opinions which they had given on the subject of intellectual property rights. The former client did not call any advocate and solicitor who specialised in intellectual property law to testify in court. The appeal was allowed and the claim was dismissed.
>
> [81] However, in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380; [2020] 5 CLJ 82; [2020] 3 AMR 317 (CA), Suraya bt Othman JCA speaking for the Court of Appeal distinguished *Shearn Delamore*'s case and stated that *the failure to call an expert to testify as to the standard of care that is expected of an advocate and solicitor is not fatal in every case of professional negligence against an advocate and solicitor*.
>
> [82] *The issue in that case was a simple case, which pertained to the duty of a practitioner to inform and advise the client of the consequence of non-payment of security for costs (which was ordered by the court) which would result in the case being struck out* (see para [64] of the judgment).
>
> [83] Thus, applying the principles that may be culled from the cases mentioned above, and looking at all the circumstances, *we are satisfied that in the present case, the failure on the part of the appellant to call an advocate and solicitor to testify on how a reasonably incompetent advocate and solicitor would have handled the situation, is not fatal on the issue of breach of standard of care of a reasonably competent advocate and solicitor*.
>
> [84] In our view, apart from the initial negligence of not attending court on 11 January 2016, the respondents had compounded or aggravated their initial negligence by taking the route of not filing an appeal against the dismissal of the

reinstatement application and proceeding instead to file Suit 18. Of course, there is no certainty that an appeal to the High Court or the Court of Appeal would have resulted in a reinstatement of Suit 04. We should add that the situation was not helped by the lack of forthrightness on the part of the respondents as to the precise reason for their non-attendance on 11 January 2016 and the third respondent's woefully inadequate and unclear affidavit in support of the application to reinstate Suit 04. Yet further, the third respondent did not reply to the affidavit by Sinnayah's solicitor which stated that the request was only for 7 January 2016 to be vacated. This last omission in our estimation, spoke volumes against the respondents.

[85] Ultimately, by their various actions and inaction or inadequacies, the respondents had decimated the appellant's chance of recovery against Sinnayah. In the event, there was a clear and unmistakeable finding of professional negligence by the SCJ in Suit 313 and those findings are in our view, clear, cogent and convincing.

[86] We may also add that the respondents' failure to respond to the appellant's letter dated 26 March 2016 and the letter of demand dated 27 April, 2017 weighs heavily against the respondents.

[87] In our view, there was no appealable error or any misdirection by the SCJ in her conclusions as to the respondents' liability for negligence. On appeal, the learned judge took the view that the appellant was negligent as they had failed to turn up in the sessions court on 11 January 2016. (Emphasis added.)

[33] Thus, guided by the principles set out in the authorities above, this court finds that the nature of the alleged negligence in this case — such as preparing documents with incorrect addresses, inconsistent dates, and contradictions between statutory declarations, caveat forms, and the SPA — was not of such complexity that expert assistance was necessary. These were basic errors apparent on the face of the documents and did not involve nuanced questions of conveyancing practice where professional opinion would be needed.

[34] Furthermore, the learned SCJ considered the authorities cited by both parties and the evidence before the court. She specifically referred to the glaring nature of the errors and concluded that they were of such a serious nature that no competent solicitor should have made them. In para 24 of her grounds, she noted that the mistakes were grave enough that they could not be treated lightly. This approach aligns with *Hijau Biru Envirotech*, where obvious omissions in legal work rendered expert evidence unnecessary.

[35] Therefore, I agree that the learned SCJ was entitled to determine the standard of care based on the documents and evidence presented. The decision was in line with judicial precedent, and there was no misapplication of the doctrine of stare decisis.

Whether negligence was proven on a balance of probabilities

[36] The next question was whether the respondent discharged the burden of proving that the appellants breached their duty of care and caused the loss claimed. It is trite law that the plaintiff must prove: (a) a duty owed; (b) a breach of that duty; and (c) damage resulting from the breach.

[37] The duty of care owed by a solicitor, especially in conveyancing, is well recognised. A solicitor must exercise the skill, care, and diligence expected of a reasonably competent practitioner to ensure that documents are accurate, complete, and consistent, and that the client's interests are protected. The High Court in *Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors* [2016] 10 MLJ 517 confirmed that conveyancing solicitors must ensure proper preparation of documents and accuracy of details.

[38] In the present case, the respondent pleaded and proved that the appellants prepared documentation that was riddled with inconsistencies. The errors were detailed in evidence and highlighted by the sessions court, which the appellants did not rebut:

(a) the caveat form (Form 19B) was dated 14 June 2015, prior to the SPA, which was dated 3 July 2015;

(b) the statutory declaration for the caveat application was dated 14 July 2015, which creates contradictions regarding the sequence of events;

(c) the address of the property was incorrectly stated in multiple documents, with some references to a completely different location. The valuation report (P16) at pp 233 to 258 of encl 5 correctly states the address as No 34, Jalan Spektrum U16/9, Taman Bukit Subang, Seksyen U16, 40160 Shah Alam, Selangor Darul Ehsan. Conversely, several documents prepared by the appellants between 2015 and 2016 incorrectly recorded the address as 'Datin Persekutuan 34 Jalan Spektrum U16/9, Taman Bukit Subang, 40150 Shah Alam, Selangor', including letters dated 3 July 2015 (P5, P8), 30 July 2015 (P9), 28 August 2015 (P10), 9 October 2015 (P11), 19 November 2015 (P12), 16 May 2016 (P13), and a statutory declaration (P4) at p 222; and

(d) more importantly, the SPA itself contained inaccurate descriptions of the property. In the SPA (P2) at p 208, encl 5, under the property description, it wrongly referred to another address, 34 Jalan Spektrum U16/9 16/7, Section 7 Bandar Mahkota Cheras, 43200 Batu 9, Cheras, Selangor, which was completely unrelated to the actual property. Additionally, these errors were acknowledged by the appellants in paras 8.6, 8.6.1, and 8.6.2 of their statement of defence, demonstrating a serious breach of duty.

[39] The Court of Appeal in the earlier Shah Alam case had already addressed these discrepancies, which contributed to the respondent's loss of his claim against the vendors. This finding was supported by SP3, the respondent's former solicitor, who testified that the Court of Appeal attached considerable importance to these irregularities. The appellants did not challenge the evidence provided by SP3.

[40] In the present case, the evidence presented was sufficient to establish the respondent's claim, thereby shifting the evidential burden onto the appellants. The appellants, however, elected to submit no case to answer and consequently called no witnesses nor produced any evidence to explain the discrepancies or rebut the respondent's case. Although the legal burden of proof remained with the respondent, once the evidential burden had shifted, the lack of defence evidence left the trial judge with only the respondent's version to consider. Under these circumstances, the sessions court was justified in drawing adverse inferences against the appellants, in line with the principles in *Tech Food Ingredients Sdn Bhd & Anor v Blue Seal (M) Sdn Bhd & Ors and another case* and *Takako Sakao v Ng Pek Yuen & Anor*, where the failure of a defendant to testify or adduce evidence strengthens the plaintiff's case.

[41] On the question of causation, the respondent proved that the negligent preparation of documents directly caused the failure of the transaction and the loss of his RM38,000 deposit. The appellants attempted to argue that the loss was caused by factors outside their control, but having chosen not to give evidence, they had no factual basis for this argument. The learned SCJ correctly held that the breach of duty by the appellants was causally linked to the loss suffered.

[42] In my assessment, the respondent successfully discharged the burden of proof on a balance of probabilities, and the learned SCJ's conclusion on this issue was well-founded both in law and on the facts.

Alleged departure from stare decisis

[43] The appellants further argued that the learned SCJ's decision ignored the doctrine of stare decisis by not following the ratio in *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* and *Shearn Delamore & Co v Sadacharamani a/l Govindasamy*. I am unable to agree with this argument.

[44] The doctrine of stare decisis requires lower courts to follow binding precedent. However, it also allows a court to distinguish cases where the factual circumstances are notably different. In this case, the learned SCJ examined the authorities cited, explained why they did not apply strictly, and instead relied on other binding decisions such as *Nyo Nyo Aye v Kevin Sathiaseelan*

a/l Ramakrishnan & Anor and *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors*, which permit the court to proceed without expert evidence when negligence is obvious.

[45] This court observed that in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor*, the Court of Appeal explicitly stated that 'not every professional negligence case requires an expert' especially when the errors are clear and can be judged directly. This reasoning applies directly to the current case.

[46] Accordingly, the learned SCJ did not disregard precedent; she applied the correct legal principles to the facts before her.

On the appellants' election of 'no case to answer'

[47] While not a separate ground of appeal, it is necessary to address the appellants' election to submit no case to answer. This procedural choice meant that the appellants did not explain the irregularities or defend their conduct. The effect of such an election was explained in *Tech Food Ingredients Sdn Bhd & Anor v Blue Seal (M) Sdn Bhd & Ors and another case* and *Takako Sakao v Ng Pek Yuen & Anor*, which hold that while the plaintiff still bears the burden of proof, the defendant's silence may justify the court in drawing adverse inferences and accepting the plaintiff's case if it is otherwise credible.

[48] In the case of *Tech Food Ingredients Sdn Bhd & Anor v Blue Seal (M) Sdn Bhd & Ors and another case*, Wan Muhammad Amin Wan Yahya J succinctly explained the effect of an election of 'no case to answer'. His Lordship stated that:

> [G] IMPLICATION OF THE DEFENDANTS ELECTING NOT TO GIVE EVIDENCE OR SUBMIT 'NO CASE TO ANSWER'
>
> [58] Before I deal with the various causes of action raised by the plaintiffs, the implication of the defendants' decision to submit of 'no case to answer' needs to addressed first.
>
> [59] I will begin with the cases cited by learned counsel for the first to fifth defendants on this issue and they are as follows:
>
> (i) *Yui Chin Song & Ors v Lee Ming Chai & Ors* [2019] 6 MLJ 417; [2019] 7 CLJ 740 (FC);
>
> (ii) *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4 CLJ 676 (FC);
>
> (iii) *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 (FC); and
>
> (iv) *Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Berhad* [2009] MLJU

854; [2009] 10 CLJ 234 (HC).

[60] I am in agreement with learned counsel for the first to fifth defendants' submission that it can be distilled from the above cases with regards to the submission of 'no case to answer' that:

(i) it is for the plaintiff to prove his case on a balance of probabilities and the fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his or her burden in law;

(ii) the mere fact that the defendant elects not to lead evidence does not mean that all the plaintiff's evidence is automatically to be believed;

(iii) the defences of the defendant are not under consideration. It is the plaintiff's case that is to be scrutinised for the sole purpose of establishing whether the plaintiff has proved his or her case on a balance of probabilities;

(iv) submission of 'no case to answer' can be on the basis that:

(a) accepting the plaintiff's evidence at face value, no case has been established at law; or

(b) the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

(v) even though the defendant does not call any evidence, it does not mean that the trial judge must believe everything the plaintiff has adduced.

[61] In other words, just because the defendants have elected to submit 'no case to answer' does not mean the plaintiffs' claim will be automatically allowed. The plaintiffs have to still prove their case.

[62] However, what learned counsel for the first to fifth defendants did not submit on is how and what happens to the evidence adduced by the plaintiff's where the defendant's have chosen to submit 'no case to answer'.

[63] Before I continue on this issue and refer to the cases that were not cited by learned counsel for the first to fifth defendants, it is important for me to first highlight some key factual features of the cases he had referred to:

(i) in *Yui Chin Song* all the defendants save for one made a submission of no case to answer. The plaintiffs' claim was dismissed;

(ii) in *Kerumtum* the second defendant did not give evidence and a total of nine witnesses gave evidence for the defence. The plaintiff's claim was dismissed;

(iii) in *Syarikat Kemajuan Timbermine* no witnesses were called by the defendant and the plaintiff had failed to prove on a balance of probabilities the existence of a settlement agreement which the plaintiff claimed existed. The plaintiff called three witnesses. The plaintiff's claim was dismissed; and

(iv) in *Leolaris* the defendant did not call any witnesses or cross-examine the

plaintiff's four witnesses. The plaintiff's claim was allowed.

[64] How the burden of proof is treated and the shifting of the burden in a case where the defendant makes a submission of 'no case to answer' was decided in *Keruntum* where the Federal Court held as follows:

> [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, *then the evidential burden shifts to the other party* (see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; [1978] CLJU 223. When the burden shifts to the other party, *it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods*. See *Tan Klim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 ; [1998] 1 CLJ supp 147. (Emphasis added.)

[65] Learned counsel for the plaintiffs, on the other hand, relied on the Federal Court case of *Takako Sakao v Ng Pek Yuan & Ors and another appeal* [2009] 4 MLJ 66; [2009] 5 CLJ 200; [2009] 3 MLRA 74 where the first respondent failed to attend court and give evidence. The appellant's claim was allowed by the Federal Court and held, inter alia, as follows:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. *In the first place, the evidence given by the appellant ought to have been presumed to be true*. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:
>
> > If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, *all the evidence given must be presumed to be true*.
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: *does the first defendant/respondent have a case to answer?* This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. *She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable.* In these circumstances *it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way*.
>
> He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.
>
> [5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's

contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. *Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference*. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1990] 1 MLRA 532; [1991] 1 CLJ Rep 155. See also, *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 1 MLRA 605; [1997] 4 CLJ 509 where Peh Swee Chin FCJ said: '*The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it*'. There are two other authorities that are of assistance on the point. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. *This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold*.

Brooke LJ then went on to say this:

> From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to *strengthen the evidence adduced on that issue by the other party or to weaken the evidence*, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been *some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue*.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is *some credible explanation given*, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

The other case is *Crawford v Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the advice of the Privy Council said:

> *It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees*.

[7] In the present instance, there is no doubt that *the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded*. Based on the authorities already cited, it is patently clear that the trial judge in the present case *ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties.* This, the trial judge clearly omitted to do. *Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence*. His non-direction upon such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice. To conclude the first issue, it is our judgment that there was no judicial appreciation of the appellant's evidence. A reasonable tribunal correctly directing itself on the facts and the relevant law would have held that the appellant had indeed contributed RM194,610 towards the purchase price of the building; that there was a mutual understanding between the appellant and the first respondent that they shall be beneficial co-owners of the property in question in equal shares; and that the first respondent had acted in breach of that understanding. (Emphasis added.)

[66] In *Takako Sakao*, the Federal Court held that the effect of the defendant's failure to give evidence, discredits his case and strengthens the plaintiffs case.

[67] Justice Mary Lim (as she then was), in *Leolaris*, examined the effect of the pleaded defence where the defendant submitted 'no case to answer' and held as follows:

> [23] In a submission of no case to answer, *the defences pleaded are not under consideration*. To put it bluntly, on such an occasion the defendant is actually saying that it *need not bother to offer and lead any evidence on any of the pleaded defences because the plaintiff's case is bad as it has not been made out* and ought therefore to be dismissed without more. It is still the plaintiffs case that is scrutinised for the sole purpose of establishing whether the defendant has made a right submission. If the submission is properly taken on the law and on the facts, then the plaintiffs case would be dismissed. However, where the defendant fails in its submission and the plaintiff succeeds in discharging the burden of proof, the plaintiffs case will be allowed. That is why it is said that the defendant will stand or fall by the submission. (Emphasis added.)

[68] It can thus be summarised that while it is a given that the burden of proof lies with the plaintiff, however, in a situation where the defendant submits 'no case to answer' the court needs to be satisfied that:

(i) the evidence adduced by the plaintiff is sufficient to prove his case

(*Keruntum*; *Takako*);

(ii) where the defendant provides no reasons (or credible reasons) as to why he did not care to give evidence the court will normally draw an adverse inference (*Takako*);

(iii) if such an adverse inference is drawn, it may strengthen the evidence adduced by the plaintiff or weaken the evidence, if any, adduced by the defendant (*Takako*);

(iv) there must, however, have been some evidence, however weak,

(v) adduced by the plaintiffs before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue (*Takako*); and

(vi) the defendant's defence will not be taken into consideration (*Leolaris*; *Takako*).

[69] I will conclude with the following passage from *Yui Chin Song* which in turn referred to a passage from the case of *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Along Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369:

> [50] In this regard, Suriyadi, JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369, recognised the above riding in the following passage:
>
> > There are, however, *two sets of circumstances* under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, *accepting the plaintiff's evidence at its face value*, no case has been established in law, and in the other that the *evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged*. (Emphasis added.)

[70] Therefore, to put it simply, as the defendants have submitted 'no case to answer' the issue is whether the evidence adduced by the plaintiffs in this case is 'so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged' (*Mohd Nor Afandi*; *Yui Chin Song*). It therefore follows that if the plaintiffs succeed in discharging that burden of proof, then the defendants shall have no defence against the plaintiffs' claim.

[71] It must also be borne in mind that the evidence tendered by the plaintiffs must also be examined in light of the admissions of liability made by Blue Seal regarding, inter alia, the PU panels coupled with the fact that the defendants chose not to adduce any evidence by calling any witness or tendering any document to oppose the plaintiffs' evidence and case. The defendants' do so at their own peril (*Takako*) and it is a risk that they take.

[49] In this case, as previously explained, the respondent has proven his case, and the evidence presented is either inherently incredible or inherently improbable. The respondent's evidence was compelling, supported by documents. Consequently, the evidential burden shifted to the appellants. The

appellants, however, offered no competing narrative. Therefore, the learned SCJ was justified in accepting the respondent's case in its entirety.

[50] Considering the totality of the evidence, I agree that the sessions court was correct to conclude that the appellants, as the respondent's conveyancing solicitors, owed him a duty of care which they breached by making serious and fundamental errors in preparing key documents. These breaches were so obvious that no expert evidence was needed to prove them, and they directly caused the losses the respondent suffered.

[51] The findings were well supported by evidence and consistent with the applicable law. There was no error warranting appellate intervention. Therefore, the appeal was dismissed with costs of RM15,000. The decision of the sessions court was upheld.

Appeal dismissed with costs of RM15,000; decision of the sessions court was upheld.

Reported by Dzulqarnain Ab Fatar